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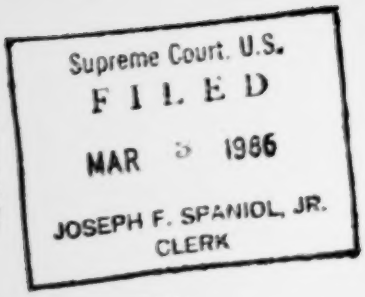

NUMBER _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER 1985 TERM

****

FRANCISCO A.H. RIVERA,
Petitioner

VS

THE STATE OF ARIZONA
Respondent

****

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

****

PETITION FOR CERTIORARI

Petitioner (Pro Per):

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TABLE OF CONTENTS

The issues presented for review are:	Page
1. Did the trial court err in ommitting the statistical evidence which helps substantiate Respondent's pretext and long term, intentional employment discrimination towards Hispanics and Petitioner?	15
2. Did the trial court err by dismissing and not hearing Petitioner's claim of retaliation by Respondent?	21
3. Did the trial court err when it did not consider as pretext the Respondent's witnesses' testimony, which shows Respondent's intent of racial employment discrimination towards Hispanics and Petitioner?	26

TABLE OF AUTHORITIES

	Page
BROOKS V WOOTEN 355 F 2d 177 (1966)	25
CLARK V PENNSYLVANIA RAILROAD COMPANY 328 F 2d 591 (1964)	24
COASTAL STATE MARKETING INC. V HUNT C.A. 694 F2d 1358 (1983)	23
DAVIS V CALIFANO 613 F 2d 957 (1979)	20
DRAFT INC. V RIMAR MFG INC. 524 F Supp 1049 (1981)	25
EEOC V VIRGINIA CAROLINA VENEER COMPANY 409 F Supp 775 (1980)	25
FURNCO CONSTRUCTION CORP V WATERS 438 US 567 (1979)	19
GRIGGS V DUKE POWER COMPANY 401 US 430 (1972)	20
HAZELWOOD SCHOOL DISTRICT V UNITED STATES 433 US 299 (1977)	19, 20
J.F. EDWARDS CONSTRUCTION COMPANY V ANDERSON SAFEWAY GERARD RAIL CORP 542 F 2d 1323 (1976)	24
LINDSEY V ANGELICA CORPORATION 25 FEP 402 (1981)	27
MCDONNELL DOUGLAS CORP V GREEN 411 US 805 (1973)	19
MEAD V U.S. FIDELITY AND GUARANTEE COMPANY 442 F Supp 114 (1977)	25

	Page
MINOR V CALIFANO 17 FEP 756 (1978)	25
MOSLEY V GENERAL MOTORS CORPORATION 23 FEP 1637 (1981)	25
TAYLOR V TELETYPE CORP 648 F 2d 1129 (1981)	20
TEAMSTERS V UNITED STATES 431 US 324 (1977)	20
UNITED STATES V CITY OF SOCORRO 25 FEP 815 (1976)	25
UNITED STATES POSTAL SERVICE V AIKENS 460 US 711 (1983)	24, 29
CIVIL RIGHTS ACT OF 1964	2, 3, 20
CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV	3

The Petitioner, acting propia persona and without funds, respectfully asks the Court, pursuant to Rule 21 of the Rules of the Supreme Court of the United States, for a writ of certiorari in regards to the following issues:

(a) The three questions presented for review are:

1. Did the trial court err in omitting the statistical evidence which helps substantiate Respondent's long term, intentional employment discrimination towards Hispanics and Petitioner?

2. Did the trial court err by dismissing and not hearing Petitioner's claim of retaliation by Respondent?

3. Did the trial court err when it did not consider as pretext the Respondent's testimony, which shows Respondent's intent of racial employment discrimination towards Petitioner and Hispanics?

(b) The caption of this case in the

Supreme Court of the United States contains the names of all parties.

(c) A table of contents and a table of authorities cited.

(d) The United States District Court for the District of Arizona, Tucson Division, ruled for Respondent on August 8, 1984, and subsequently denied Rivera his Motion for Rehearing. The appeal went to the United States Court of Appeals, Ninth Circuit, which rendered its decision, without any rehearing, on December 29, 1985. Rivera's Motion for Rehearing En Banc to the appeals court was denied on December 5, 1985.

(e) The United States District Court, the United States Court of Appeals and the United States Supreme Court have jurisdiction in this case over subject matter and the parties, pursuant to Title VII of the Civil Rights Act of 1964, which grants jurisdiction in these matters to the federal courts.

The petition is timely and meets all the requirements for review.

(f) The Civil Rights Act of 1964, Title VII and provisions of the United States Constitution, Amendment XIV, provide for equal protection to persons as citizens who are subject to the jurisdiction of the United States and the state wherein they reside.

(g) A brief statement of the case and its material facts are:

The period in question in this case is from June, 1980 through February, 1981, during which Respondent employed Petitioner and retaliated against him until he left in February, 1981.

This Petitioner filed charges of racial employment discrimination with the EEOC on June 30, 1980, after having interviewed on June 20, 1980, for the two supervisory positions with the Administration for Children, Youth and Families (ACYF). Two less qualified Anglo females were selected.

The Petitioner filed charges of retaliation with the EEOC on July 21, 1980, after ACYF placed him on night duty, which he had never served before and had been assured he would not serve.

The Petitioner filed additional charges of retaliation with the EEOC on January 23, 1981, after ACYF gave him a poor performance evaluation, which he has never experienced in the ten years under Respondent's employment.

Petitioner filed a complaint in Federal Court on July 21, 1981, claiming employment discrimination due to national origin and reprisals. He later filed an amended complaint on November 4, 1981, claiming further retaliation by Respondent.

The non-jury trial was held on July 17 and 20, 1984, before Judge William Browning, who made his decision on August 9, 1984, in favor of Respondent. During trial, Petitioner presented statistical and realiatory evidence.

Judge Browning refused to hear the claim of retaliation or consider specific retaliatory examples, stating that this issue was not in the pre-trial orders, even though these examples clearly demonstrate discrimination towards Petitioner.

Petitioner filed a Motion for Rehearing on August 28, 1984, but this was denied by Judge Browning.

Petitioner filed his appeal to the United States Court of Appeals, which affirmed Judge Browning's decision. Petitioner's Motion for Rehearing was denied by the Court of Appeals, on December 4, 1985.

At trial before Judge Browning, the principal witnesses were Petitioner plus Boyd Dover and Beth Sidman for Respondent and its counsel was Heln Baldino. Petitioner's counsel was Lynn Saul and his witnesses were Juan Coss, Francisco Fernandez and Andres Renteria. Petitioner could not afford any counsel beyond the trial level, thus he has continued propia persona.

Petitioner presented testimony about his background and qualifications in addition to the make-up of ACYF in Pima County, giving a statistical breakdown of the organization as well as presenting a community profile about the clientele ACYF served, thus establishing a need for Hispanic staff and supervisors to serve the 150,000 Hispanic inhabitants in Pima County. Petitioner further testified about his qualifications exceeding those of the two selected women and presented evidence about the pre-selection of one of them, Frances Jennings.

At trial, Petitioner also cited specific examples of ACYF retaliation towards him after he filed his EEOC complaints. Some of these examples were night duty, derial of leave requests, the performance evaluation and so forth.

Sidman's testimony was limited though she did state that in seeking recommendations, she never called on Hispanics and was at a loss for words in trying to ex-

plain this discrepancy as she was with her inability to recall who she had contacted for input.

Dover's testimony was extremely inconsistent and hardly credible. His trial testimony does not coincide with what he stated under oath by deposition on June 12, 1984, in the presence of Respondent's lawyer, Baldino. Secondly, his testimony at trial was seriously impeached by Andres Renteria, who refuted everything Dover had claimed Renteria told him (Dover) about Petitioner. Thirdly, Dover repeatedly contradicted himself by claiming poor recall about whom he sought recommendations from and that he did not speak with any Hispanics, yet he remembered Renteria, a Hispanic administrator employed by Respondent in the Rehablitation Services Administration. Finally, Judge Browning did not give credence to Dover's (nor Sidman's) account that the two supervisory positions were temporary but accepted Petitioner's

version that in fact the positions were permanent and promotional.

Judge Browning rendered his decision in favor of Respondnent despite some blatant, obvious errors in his handling of the trial, such as Dover's flawed testimony, excluding Renteria's rebuttal, not considering retaliatory evidence and more.

After the trial court's decision, Petitioner proceeded pro per due to lack of funds and he turns to the Court of last resort, the United States Supreme Court.

The Court should note here that Petitioner cannot afford counsel nor can he provide the Court with an entire trial transcript. Furthermore, due to time constraints and Petitioner's inexperience and insufficient resources (clerical help, copying equipment, library materials, etc.), Petitioner is placed at a tremendous disadvantage, therefore he asks the Court for some understanding and for whatever assistance is available.

(h) This petition does not seek to have reviewed a judgment of a state court.

(i) The issues sought to be reviewed were properly presented in the District Court when the case was heard before Judge Browning on July 17 and 20, 1984, in Tucson, Arizona. The issues were presented by a motion at the hearing on Rivera's Motion for Rehearing before Judge Browning on August 28, 1984, but the motion was denied. Judge Browning did not give serious consideration to these issues. They were again raised by Petitioner in his appeal to the United States Court of Appeals, which did not seem to seriously consider Petitioner's appeal either.

Assignment of Error Number 1. Petitioner assigns as error the following: To the action of the trial court by failing to give weight to the statistical evidence presented in that this demonstrates a clear cut pattern of discrimination by Respondent towards Hispanics and Petitioner and

shows pretext on the part of Respondent.

Assignment of Error Number 2. To the action of the trial court in failing to hear the issue of retaliation being that this shows pretext, disparate treatment by Respondent towards Petitioner and furthermore, illustrates Respondent's attempts to subjugate minorities who exercise their rights, which are quaranteed and protected.

Assignment of Error Number 3. To the action of the trial court in failing to consider as pretextual the inconsistent testimony of Respondent's witnesses, who stated they did not call on Hispanics for recommendations about the applicants; who contradicted themselves repeatedly and who were not credible in view of Renteria's testimony that refuted Dover's and Sidman's.

In his appellate brief, based on the record, the Petitioner submitted the five following issues to the United States Court of Appeals.

1. Whether the use of statistical evi-

dence presented at trial helps substantiate intentional employment discrimination by Responsdent towards Hispanics and this Petitioner.

2. Whether the District Court should have heard Rivera's claim of retaliation and erred in not doing so by dismissing his charges of retaliation by Respondent.

3. Whether Dover's and Sidman's testimony, upon which the District Court based its decision, should have been excluded as evidence because of hearsay.

4. Whether both the credibility of Dover and Sidman must be considered in deciding Respondent's intent of racial employment discrimination towrds Hispanics and Rivera.

5. Whether the attorneys errors, negligence, inadvertance, misconduct and incompetence affected the results of this case adversely and to the detriment of Rivera.

In presenting these issues to the United States Supreme Court, the Petitioner has

consolidated these to three and identified them as: 1) statistical, 2) retaliation and 3) pretext, claiming the combined trial errors call for reversal.

Through its August 8, 1984, decision, the District Court factually and legally erred in not considering the statistical evidence that was given at trial. This was later presented at the hearing on the Motion for Rehearing and was outlined in Rivera's brief to the appeals court. Judge Browning chose the evidence without objectively weighing it. Even his "most popular" quotation is misleading and out of context.

The trial court's misinterpretation of Rivera's statistical evidence runs counter to case law and rulings issued by the United States Supreme Court and other federal courts, thus denying Rivera the relief sought.

The trial court simply chose not to hear Rivera's charge of retaliation by Respon-

dent, claiming that the pre-trial order, which did not include the issue of retaliation, controlled the course of the trial. It failed, however, to note that Rule 16e of the Federal Rules of Civil Procedure allows for the pre-trial order to be amended when a manifest injustice has occurred, as has happened in this case. The trial court chose the easy way out by eliminating the statistical and retaliatiory evidence and not addressing the pretextual testimony, rather than seek and carry out justice.

The District Court was in error in stating that Rivera did not carry the burden of showing that Respondent's reasons for not hiring him were pretextual given that the District Court did not even bother to address this in its decision nor note Renteria's testimony or Dover's inconsistencies.

The Petitioner asked the District Court for a rehearing, raising the above issues

and noting the deficiencies in the representation of his case by his counsel, Lynn Saul, and the lack of cooperation by Resondent's counsel, Helen Baldino. Judge Browning said no and termed Saul's advocacy as lacking "reasonable diligence" by her not presenting documents, not amending the pre-trial order to include the retaliatory charge and more.

Petitioner asked to proceed in forma pauperis but was denied. He continued on a pro per basis in his appeal to the Ninth Circuit Court of Appeals but he did not prevail, with the appeals court, after reviewing the appeal on the merits, rendering a very perfunctory decision affirming Judge Browning's ruling.

Rivera filed a Motion for Rehearing En Banc but was again denied as of December 5, 1985.

(j) This is an application for review on writ of certiorari of judicial discretion in that a Federal District Court and

a Federal Appeals Court have decided on important questions of case law which appear to be in conflict with the applicable decisions of the United States Supreme Court and other federal courts.

The issues arise from questions presented in the appeal and which are:

1. Did the trial court err in ommitting the statistical evidence which helps substantiate Respondent's long term, intentional employment discrimination towards Hispanics and Petitioner?

2. Did the trial court err by dismissing and not hearing Petitioner's claim of retaliation by Respondent?

3. Did the trial court err when it did not consider as pretext the Respondent's witnesses' testimony, which shows Respondent's intent of racial employment discrimination towards Hispanics and Petitioner?

1) The statistical data is quite lengthy to produce here and could well cause Petitioner to exceed the page limitations

of the petition. It is best to obtain this information from the appeal.

Judge Browning's contention that the "only statistical evidence" presented was the pool of six applicants is clearly erroneous. In fact, one of the prime pieces of evidence given at trial was that for years, and up to 1985, there had been the total exclusion of Hispanics from the supervisory ranks in ACYF in Pima County and practically throughout Arizona, but the trial court simply chose to ignore this. This clearly exemplifies a long term, discriminatory practice on the part of Respondent, which time and again refused to hire as supervisors those Hispanics who applied for these positions. Petitioner, and even Juan Coss, a witness for Petitioner, testified about this and stated that they had applied and interviewed for ACYF supervisory positions which went to less qualified Anglo candidates.

Rather than taking a global view and

applying this in its analysis of Rivera's individual disparate treatment case, the trial court completely ignores the statistical evidence presented and clings to the "pool of six applicants". This latter analysis is gravely flawed because this gives Respondent, and other employers as well, a ready-made excuse to continue discriminating. Respondent's employment practice or personnel policies are to interview a pool of about seven applicants for each position. This personnel rule or guideline has been followed for many years. Yet by using this practice of a pool of seven applicants each time, the Respondent has established a predominantly Anglo work force in excess of 650 employees that exclusdes Hispanics from the management positions. Each time, Respondent can simply state that the pool of applicants is too small while all along favor Anglo applicants.

The statistical evidence given is accurate, however, when the Petitioner in his

interrogatories requested this data from Respondent, the latter refused to provide it and answered "it was too cumbersome to produce", instead of making it available to Petitioner. Add to this that Petitioner's counsel, Saul, did not exercise "reasonable diligence" in trying to acquire the statistical information or to present it and one can readily surmise that both attorneys acted unprofessionally and because of their conduct, this evidence was not handled properly. Nevertheless, Petitioner at trial did give the statistical evidence as outlined in his brief, however, had the attorneys done their job right, this evidence would have been presented in a more appropriate manner.

The statistics in this case show an appalling picture of ACYF staffing patterns. How do the courts and Respondent explain the long history of racial discrimination perpetrated by Respondent against Hispanics? Why were there no Hispanics in

the management levels of ACYF? Why do the lower level positions contain a far higher percentage of Hispanics in the day care unit, the foster home unit, the eastside ongoing unit, etc.?

McDonnell Douglas Corp v Green, 411 US 805 (1973) states that statistics are very helpful as evidence in individual disparate treatment cases in determining employers' personnel policies and hiring practices. In Furnco Construction Corp v Waters, 438 US 567 (1978), the same Court ruled that statistical proof is relevant to the issue of discriminatory intent in deciding that issue.

In Hazelwood School District v United States, 433 US 299 (1977), the United States Supreme Court wrote that where gross statistical disparities could be shown, they alone may constitute in a proper case prima facie proof of a pattern of discrimination. Also, it held that evidence of long duration and showing gross

disparity between the composition of the work force and the community is very significant in showing intent to discriminate. The Hazelwood analysis was applied to individual disparate treatment cases in Davis v Califano, 613 F., 2d 957 (1979).

Taylor v Teletype Corp, 648 F. 2d 1129 (1981) held that if disparity is statistically significant and race is the only variable separating the two groups, the court may correctly infer that racial considerations are responsible for the disparity. Hazelwood, Davis and Taylor can be applied to Rivera's case.

Moreover, Griggs v Duke Power Company, 401 US 430 (1972), states that Congress directed the Civil Rights Act to the consequences, effects and results of racially discriminatory practices and not simply to intent.

Finally, Teamsters v United States, 431 US 324 (1977) stated that the usefulness of statistics depends on the surrounding

circumstances of the case. The circumstances of this case — Jennings' pre-selection; Rivera's qualifications better than Barnes for certain; Dover's inconsistent testimony and more — clearly show a practice of racial employment discrimination against Hispanics and Rivera as illustrated by the statistics and examples cited in Rivera's appellate brief.

2) The issues of retaliation needed to be heard for various important reasons.

Petitioner, through counsel, attempted to have this issue heard at trial initially as it has a crucial bearing on the case. Judge Browning refused to consider it like he did at Rivera's hearing on his Motion for Rehearing. Everything is to be gained by hearing this issue which was raised in Rivera's complaints, even if Judge Browning had decided against Rivera, at least this question would have been addressed, answered and possibly settled. Right now its neither except that Petitioner had very pecu-

liar experiences soon after filing his EEOC charges, experiences he had never had before, such as night duty, poor performance evaluation (the only one in over ten years of employment with the Respondent), denials of leave requests, refusals to allow his transfer and so forth, but other employees did not experience this.

Respondent has conveniently claimed that the pre-trial order, under FRCP 16e, governs the course of the trial and can only be modified to prevent a manifest injustice.

Simply stated, Respondent did not want to have this issue heard because it would cast it, the government of Arizona, in bad light and show it actually intentionally perpetrates harm upon minorities. Also, it shows Respondent discriminated against Rivera because in essence such treatment singles out Rivera but not others, and it does so to make Rivera, Hispanics and other protected groups subservient to the will

of the state and to the detriment of these individuals' civil rights.

Foremost in this argument though is not that Petitioner's counsel, Saul, committed a blunder in not amending the pre-trial order to include the retaliatory charge but that the trial court, and the appeals court also, were aware of this and could have taken the steps to correct this and thus get to the roots of the issues about how Respondent in fact discriminates and treats minorities, but Judge Browning refused to do this despite evidence presented, and was not interested, thus his callousness and insensitivity became apparent.

Moreover, Judge Browning refused to prevent a manifest injustice from occurring. Change is allowed by FRCP 16e to promote justice. The standard for modifying a final pre-trial order remains one of finding that a manifest injustice would result.

Coastal States Marketing, Inc. v Hunt C.A., 694 F 2d 1358 (1983), states that

the trial courts have not only the right but the duty to relieve a party from a pre-trial order when necessary to avoid a manifest injustice or adjudication, based on the sporting theory or when there is substantial contrary evidence.

In the employment discrimination case of United States Postal Service v Aikens, 460 US 711 (1983), the Court held that the trier of fact should consider all evidence. In Rivera's case, Judge Browning refused to consider the retaliatory evidence, which he should have heard. Judge Browning erred in not considering the retaliatory evidence because although the court can request all parties to stipulate to all the undisputed facts, it cannot order the parties to stipulate to all the facts. J.F. Edwards Construction C. v Anderson, Safeway, Gerard Rail Corp, 542 F 2d 1323 (1976)

Evidence was admissible and the pre-trial order amended to prevent injustice in Clark v Pennsylvania Railroad Company,

328 F 2d 591 (1964) on through Draft Inc. v Rimar Mfg Inc., 524 F Supp 1049 (1981).

The courts may also apply the standard of FRCP Rule 15b that allows the pre-trial order to be amended if it is determined that justice would thereby be served, Brooks v Wooten, 355 F 2d 177 (1966).

The injustice is manifested here by Respondent denying Petitioner his normal working hours and placing him on night duty (see EEOC v Virginia Carolina Veneer Company, 409 F Supp 775 (1980) and Minor v Califano 17 FEP 756 (1978); by harassing his family (see United States v City of Socorro, 25 FEP 815 (1976); by denying his requests for leave and transfer but not those of others (Mosley v General Motors Corporation, 23 FEP 1637 (1981); by giving Rivera a poor performance evaluation (Mead v U.S. Fidelity and Guarantee Company, 442 F Supp 114 (1977). Many other examples of ACYF's retaliation towards Petitioner are documented.

The trial court had the power to hear the issue of retaliation. In choosing not to do so, it erred and set a bad precedent by thus leaving minorities to fend for themselves without the courts to help them. This makes employers more powerful plus chills minorities who, fearing reprisals, will refuse to exercise their rights.

3) The last issue is directed at Respondent's various instances of pretext.

Three categories of evidence are used to show pretext: statistics, direct evidence and comparative evidence.

The statistics as given at trial and outlined in the appellate brief clearly show pretext. A pattern of racial employment discrimination by ACYF towards Hispanics exists despite denials by Respondent that it does not discriminate. These statistics greatly favor Anglo employees and support Petitioner's position.

The direct evidence can be seen by the impeaching testimony of Renteria. Further,

Dover contradicted himself by stating, first, he did not remember who he had spoken with and that he had not talked with any Hispanics nor had Renteria recommended Rivera. The transcript portions, which could be sought from the trial court by this Court, show Dover as being inconsistent by later stating he spoke with Renteria, but Renteria spoke very positively about Rivera, denying he talked to Dover.

Dover and Sidman also said they did not inquire of Hispanics about the applicants. This shows pretext. In Lindsey v Angelica Corporation, 25 FEP 402 (1981), the court held that pretext is shown by demonstrating that an employer acted contrary to its own policy. Dover and Sidman excluded Hispanics from the hiring process yet they claim they did not discriminate against Hispanics.

Also, Judge Browning did not believe Baldino, Dover nor Sidman that the two

supervisory positions were temporary. He believed Petitioner, who stated that the positions were promotional and permanent. This illustrates Respondent's tactic to keep Petitioner from meeting the requirements of the McDonnell test, but this tactic was pretextual as well.

Petitioner maintained that Jennings had been pre-selected to one of the positions and presented evidence dated before the day of the interviews, yet Respondent denied any pre-selection, saying Rivera was less qualified and recommended, but Renteria refuted this.

Comparative evidence is seen in Respondent retaliating against Petitioner. Other employees were not placed on night duty, neither did they receive bad performance evaluations nor were they refused leave, and much less did they have their families harassed.

Comparative evidence is demonstrated as well by showing that Petitioner never has

had a bad evaluation in over ten years of employment with Respondent nor has he ever been on night duty except for the period of time indicated. These examples make Respondent not credible.

Respondent's arguments are pat and spurious and the trial and appeals courts' decisions based on these arguments are unsound. These do not alter the facts that one of the applicants was pre-selected; that Rivera had more tenure than Barnes under Respondent's employ; that Rivera was placed on night duty but not others; that Rivera received a poor performance evaluation and his family was intimidated and all during, and only during, the seond half of 1980, before leaving ACYF.

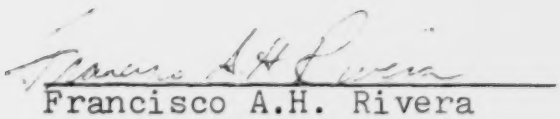
The trial court acted in a very cavalier and injudicious manner and the appeals court affirmed and encouraged this type of judicial conduct, which is contrary to the holding of Aikens, a case stating that all evidence, not only direct

evidence of discriminatory intent, should be given the weight it merits. The courts' rulings must be reversed.

Petitioner asks the Court to kindly excuse any oversights contained in this petition as these are unintentional and may occur with frequency in view of his lack of expertise, though every attempt was made to adhere to the instructions, rules and the sample petition provided by the Court to Petitioner.

Thank you.

Respectfully submitted.



Francisco A.H. Rivera
7254 E. Princeton
Tucson, Arizona 85710

CERTIFICATE OF SERVICE

I certify I served by United States mail a copy of this petition for certiorari on the Arizona State Attorney General, sent to: Helen Baldino, Assistant Attorney Genreal, 1275 West Washington, Phoenix, Arizona 85007.

This second day of March, 1986.

Francisco A.H. Rivera

APPENDIX

NO. CIV 81-323-TUC-WDB

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FILED: AUGUST 9, 1984

FRANCISCO A.H. RIVERA

V

STATE OF ARIZONA

NO. CIV 81-323-TUC-WDB

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ORDER

This action was tried on July 17 and July 20, 1984, before the Court sitting without a jury. At the close of the trial, the matter was taken under advisement. It comes now for decision.

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. s 2000e et seq. Francisco Rivera alleges that he was denied a promotional opportunity because of his national origin. He seeks damages in the form of back pay and compensation for

lost benefits, and seeks attorney's fees. This is an intentional discrimination or "disparate treatment" case. There is no class-based claim. Plaintiff has the burden to show that the defendant took his national origin into account in failing to promote him.

The Complaint also stated a cause of action under 42 U.S.C. s 1983, but that claim was not stated in the Pre-trial Order which, pursuant to Rule 16(e), Federal Rules of Civil Procedure, "controls the subsequent course of action".

Having heard the testimony, examined the other evidence submitted, and considered the arguments of counsel, the Court makes the following Findings of Fact and Law.

FINDINGS OF FACT

The following were not contested:

1. Francisco Rivera is a Hispanic American.

2. Francisco Rivera was employed by the State of Arizona Department of Economic Security in the Child Protective Ser-

vices in June, 1980, when he sought a position there as a temporary supervisor.

3. Child Protective Services distributed a memorandum to its staff seeking applicants for two positions as temporary supervisor.

4. Francisco Rivera was qualified for the position of temporary supervisor.

5. Francisco Rivera was not selected for either position as temporary supervisor.

6. There were six or seven applicants for the two positions. Frances Jennings and Sandra Barnes were selected to fill the two positions, Jennings and Barnes are not of Mexican national origin.

7. Frances Jennings and Sandra Barnes were qualified for the positions.

8. Boyd Dover became Program Manager of the Department of Economic Security Administration of Children Youth and Families, which embraced Child Protective Services, in 1979. Boyd Dover initiated the reorganization of services, which involved

the creation of the temporary supervisory positions. Dover was responsible for selecting the persons to fill those positions.

9. At the time Boyd Dover became Program Manager, there were no supervisors in Child Protective Services who were of Mexican nationality origin or were black. Boyd Dover promoted, for the first vacancy after he became Program Manager, a black to the position of supervisor. That promotion took place before the two temporary supervisor positions were created.

10. The persons selected for the position of temporary supervisor maintained the salary and grade they had before assuming those positions. At a later time, no earlier than June 1, 1981, those positions were were reclassified to a higher grade, grade 19, which was a higher grade than those held at that time by Barnes, Jennings or Rivera.

The Court further finds:

11. Boyd Dover intended and planned

that the position of temporary supervisor would be upgraded at a later date, although his office did not have ultimate authority in the decision to upgrade those positions.

12. Boyd Dover intended and planned that the temporary supervisor positions would become permanent positions, although he did not have ultimate authority for making the positions permanent. The temporary supervisory positions were positions for which applicants were sought, and which were promotional opportunity for Rivera.

13. Factors which were considered by Boyd Dover as job criteria include strong academic credentials, experience with and ability to work well with the child protective services network, communications skills, leadership qualities--abilitities to motivate, to arbitrate, and to instill enthusiasm in others; experience as a supervisor, ability to get along well with others and have respect of others, ability to deal well under pressure, and good work.

14. Dover and his assistant, Beth Sidman, interviewed all applicants and made some inquiries of others about the applicants. Dover assessed the candidates on the basis of the interviews, the reports of others, the work records of the candidates, and personal knowledge of their work.

15. Frances Jennings had been employed by the Department of Economic Security for a longer period than Francisco Rivera and had had greater supervisory experience. She had high recommendations from peers and supervisors for her competence and skill, and was liked and respected by 10 workers over a long period of time. Dover's decision to select Jennings was based on these qualities.

16. Boyd Dover stated that Sandra Barnes gave particularly good answers in her interview and that Dover had found her, in cases worked up by her, to be comprehensive and thorough. Barnes was also well

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and experience. Plaintiff him-
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:ants for supervisory positions.
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case of individual discrimi

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FINDINGS OF LAW

1. During the relevant time, the State of Arizona, Department of Economic Security was an "employer" as the term is defined in Title VII of the Civil Rights Act of 1964, 42 U.S.C. s 2000e et seq.

2. The Court has jurisdiction of the subject matter and the parties.

3. The burden of proof and production in a case alleging discriminatory intent under Title VII was set out by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 249, 252-53 (1981). The plaintiff bears the burden of establishing a prima facie case. Then the defendant has the burden to go forward to articulate some legitimate, nondiscriminatory reason for the employee's rejection. The plaintiff must then show that the articulated reason was pretextual, or not the real reason that plaintiff did not get selected or promoted. The plaintiff must

show discrimination by a preponderance of the evidence.

4. Plaintiff established a prima facie case, as set forth in McDonnel Douglas at 802:

a. Rivera is a minority nationality background,

b. There were positions open for which Child Protective Services was seeking applicants; those positions were a promotional opportunity for Rivera. Rivera applied for and was qualified to fill those positions,

c. Rivera was not selected for either position,

d. Two others, not of minority nationality background, were selected for the positions.

5. Defendant articulated reasons other than nationality background for selecting others over Rivera. See conclusions of fact numbers 15 and 16.

6. Plaintiff did not carry the burden of showing that the articulated reasons

were pretextual. The "statistical" evidence was not sufficient to establish discriminatory intent: (1) There was no numerical evidence of the nationality makeup of the pool from which supervisors were selected. The fact that there were no supervisors of Mexican background in June, 1980, has no statistical meaning without a comparison to the pool from which the supervisors are selected. There were casual estimates of the number of Child Protective Services employees who were of Mexican nationality background, but no indication of the proportion of those who were qualified to take on the position of supervisor; (2) The number of supervisors was so small that statistical accuracy would be low; it would be difficult to establish proof on a statistical basis alone: and, (3) The numerical evidence was not put within a time frame from which the Court could conclude that there was discriminatory intent in 1980, or discrimination during the tenure

of Boyd Dover, as Program Director. Discrimination in the distant past, or by past program directors, does not prove discriminatory intent in an individual decision in 1980.

The Court concludes that plaintiff has failed to establish that he was discriminated against because of his nationality background, and thus failed to establish any basis for relief.

IT IS THEREFORE ORDERED that Judgment is entered for the defendant.

IT IS FURTHER ORDERED that each party is to bear their own attorney's fees and defendant is awarded costs.

Dated: August 8, 1984.

WILLIAM D. BROWNING
U.S. District Judge

NO. CIV 81-323-TUC-WDB

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FILED: SEPTEMBER 24, 1984

FRANCISCO A.H. RIVERA	NO. CIV 81-323-TUC-WDB
	HEARING ON PLAIN-
V	TIFF'S MOTION FOR
STATE OF ARIZONA	REHEARING

Hearing is had. Plaintiff's Exhibits 1 thru 5 are marked. The Court finds Exhibits 1 thru 5 are improperly before the Court and are not admissible. Plaintiff's Exhibits 6 thru 13 are marked. Exhibits 6 thru 13 will not be admitted as none of them contain any information which could not have, with reasonable diligence, been presented to the Court at the time of trial.

ORDER plaintiff's motion for rehearing is DENIED on the ground that whether it is treated as a Rule 59 motion, timely filed,

or a Rule 60 motion, that it presents no new evidence and no evidence which could not have been brought at the time of trial in this matter.

The retaliatory discharge claim is denied as it was not pleaded nor was it contained in the pretrial order or in any of the issues delineated by the parties prior to the trial nor was there any request at the trial pursuant to Rule 15 to amend to include a claim for retaliatory discharge.

IT IS FURTHER ORDERED that plaintiff's appeal of taxation of costs is DENIED, and FURTHER ORDER efforts to collect shall be stayed pending appeal.

WILLIAM D. BROWNING
U.S. District Judge

DO NOT PUBLISH

NO. 84-2455

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

FILED: AUGUST 28, 1985

FRANCISCO A.H. RIVERA NO. 84-2455

V. MEMORANDUM*

STATE OF ARIZONA

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Submitted July 11, 1985**

Before: FERGUSON, NORRIS and WIGGINS, Circuit Judges.

Francisco Rivera argues that the dis-

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. app. P. 34(a) and Ninth Circuit Rule 3(f).

trict court erroneously determined that the statistical evidence in his Title VII action was insufficient to establish discriminatory intent. He also maintains that the trial court should have heard his retaliation claim, that it improperly allowed in hearsay evidence and gave credence to the testimony of the state's witnesses, and that his counsel's representation was inadequate. We reject each of Rivera's arguments and affirm the judgment below.

Rivera was a social worker with the State of Arizona's Department of Economic Security, Administration for Children, Youth and Families, Child Protective Services Unit ("ACYF), in Tucson when he applied for one of two temporary supervisor positions in June 1980. Five "Anglo" women also applied. Frances Jennings and Sandra Barnes were selected. Boyd Dover, the ACYF Program Manager, was in charge of selecting the new supervisors; he and Assistant Program Manager Beth Sidman conducted inter-

views of applicants and co-workers.

The district court found that while Jennings, Barnes and Rivera were all qualified to be supervisors, Jennings had greater seniority and supervisory experience than Rivera. She had received strong recommendations from management and co-workers alike. Barnes also came highly recommended, while Rivera was not as popular among his peers.

The trial court concluded that Jennings' and Barnes' better qualifications were the legitimate, non-discriminatory reason for Rivera's rejection and that Rivera had failed to show that the articulated reason for his rejection was pretextual. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-255 (1981).

STATISTICS[1/]

Statistics can be essential to showing that the proferred reason for not hiring a particular minority group member is pretextual. International Brotherhood of Team-

sters v. United States, 431 U.S. 324, 340 n. 20 (1977). They may reveal an employers pattern of discriminatory hiring or promotion and create an inference of discriminatory intent. Diaz v. American Telephone and Telegraph, 752 F. 2d 1356, 1363 (9th Cir, 1985).

The only "statistics" offered by Rivera concerned the six applicants and Rivera's contention that his employer had many Hispanic clients, but few Hispanic employees. The sample is too small to indicate wrongdoing. See Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620-621 (1974) (discrimination claim against Mayor empowered to appoint panel, most of

1/ In actions alleging discrimination, we review findings of fact under the clearly erroneous rule, with de novo review of the question of whether facts proven by the plaintiff establish an essential element of his cause of action. Sisson v. Helms, 751 F. 2d 991, 994 (9th Cir 1985).

whose members had to be highest ranking officers of designated city-wide organizations, could not rest on racial composition percentage comparisons of city and panel: sample too small and relevant universe was not population at large); Morita v. Southern Cal. Permanente Medical Group, 541 F. 2d 217, 220 (9th Cir. 1976) (discrimination claim based on assertion that in seventeen year period, seven of eight persons promoted were white fails, number in statistical analysis too small), cert. denied, 429 U.S. 1050 (1977).

The six person sample of applicants here is so small that it is of no probative value. Rivera has not shown that the percentage of Hispanics in various political subdivisions is relevant. See Hazelwood School District v. United States, 433 U.S. 299, 307-08 and n. 13 (1977) (when special qualifications required to fill particular jobs, comparisons to the general population may have little probative value). Rivera

did not offer any statistic, from any year, from which qualified Hispanic applicant flow to supervisor positions can be inferred. See New York Transit Authority v. Beazer, 440 U.S. 568, 585-586 (1979) (expressing preference for and, perhaps, requiring applicant flow data). He did not mathematically impute discrimination.

RETALIATION[2/]

A party may be barred from advancing theories at trial that were not included in the pretrial order. United States v. First Nat. Bank of Circle, 652 F. 2d 882 (9th Cir. 1981). Rivera argues that the district court should have heard the reta-

2/ The retaliation issue was not included in the pretrial order. The district court, interpreting the pretrial order, refused to hear the issue. We review the district court's interpretation de novo. See United States v. McConney, 728 F 2d 1195, 1201 (9th Cir.), cert. denied, 105 S.Ct. 101 (1984).

liation claim because he had raised the matter in his Amended Complaint. He could not have been heard without taking the steps necessary to include the issue in the pretrial order. See Southern Cal. Retail Clerks Union v. Bjorklund, 728 F 2d 1262, 1264-65 (9th Cir. 1984).

HEARSAY[3/]

Rivera views the testimony of Dover and Sidman as consisting of inadmissible hearsay, but does not claim that either testified as to what other employees had told them about Rivera. He claims only that Dover concluded that Rivera's peer and supervisory assessments were not as laudatory as those of Barnes and Jennings. Dover's testimony as to his own determinations is not hearsay. If it were, it would

3/ We review decisions on the admissibility of evidence under the abuse of discretion standard. Brocklesby v. United States, 753 F. 2d 794, 798 n. 1 (9th Cir. 1985).

probably be admissible as an exception to the hearsay rule, under Fed. R. Evid. 803 (21) or Fed. R. Evid. 405(a). There was no abuse of discretion in admitting such testimony.

CREDIBILITY[4/]

Dover and Sidman stated that the new supervisors were to be retained in their previous grade, with temporary positions. The District Court concluded that Dover intended that the temporary positions be upgraded and made permanent. These statements are not contradictory. Other alleged contradictions are insufficient to disregard the trial court's implicit crediting

4/ Rivera objects to the district court crediting the testimony of Dover because his testimony was allegedly contradictory and contradicted. We give due regard to the trial court's judgment of the credibility of witnesses. Dunn v. Phoenix Newspapers, Inc., 735 F 2d 1184, 1189 (9th Cir. 1984).

of Dover as to the entire interview process. His testimony is apparently confirmed by that of Sidman, whose testimony is not seriously questioned by Rivera.

COUNSEL

In a criminal case, counsel is ineffective where his or her conduct so undermines the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. It must be shown that counsel's performance fell below that required of a reasonably competent criminal defense attorney and that counsel's conduct prejudiced the defense by creating a reasonable probability that, but for counsel's professional errors, a different outcome would have obtained. A reasonable probability is one sufficient to undermine confidence in the outcome. Church v. Kincheloe, No. 83-4247, slip op. at 7 (9th Cir. August 1, 1985). Assuming arguendo that Rivera was entitled to effective assistance of counsel in this

civil matter, he nevertheless has not demonstrated that any error of counsel in failing to amend the pretrial order or in her statistical analysis would have produced a different result.

AFFIRMED.

NO. 84-2455

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

FILED: DECEMBER 4, 1985

FRANCISCO A.H. RIVERA NO. 84-2455

V. ORDER

STATE OF ARIZONA

Before: FERGUSON, NORRIS and WIGGINS,
Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
APR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE (2)

SUPREME COURT OF THE UNITED STATES

No. 85-1575

FRANCISCO A. H. RIVERA,

Petitioner,

v.

THE STATE OF ARIZONA and
ARIZONA DEPARTMENT OF ECONOMIC SECURITY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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1988

IN THE

SUPREME COURT OF THE UNITED STATES

No. 85-1575

FRANCISCO A. H. RIVERA,

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v.

THE STATE OF ARIZONA and
ARIZONA DEPARTMENT OF ECONOMIC SECURITY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Arizona respectfully requests that this Court deny the petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case.

QUESTION PRESENTED

Did the courts below properly conclude that the petitioner failed to establish his claim for discrimination?

PARTIES TO THE CASE

The parties to the case are petitioner, Francisco A.H. Rivera, the State of Arizona and the Arizona Department of Economic Security an agency of the State of Arizona.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE CASE	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
JURISDICTION AND TIMELINESS	4
STATEMENT OF FACTS	4
REASONS FOR DENYING THE WRIT	6
1. Petitioner's Arguments Address Questions of Evidence and Seek Only Evidentiary Review	6
2. Rejection of Petitioner's Small Sample Was in Conformity With Prior Decisions of This Court	7
3. The Ninth Circuit's Rejection of Petitioner's Retaliation Claim Because it was not Included in the Pre-trial Order was not in Conflict With Other Decisions of the Courts of Appeals	9
4. The Ninth Circuit Did Not Err When it Determined That the Testimony of the State's Witnesses was Credible	10
CONCLUSION	11

I. TABLE OF AUTHORITIES

Cases:	Page
Allen v. United States Steel Corp 665 F.2d 689 (5th Cir. 1982)	10
Colvin v. U.S. for Use and Benefit of Magini, etc. 549 F.2d 1338 (9th Cir. 1977)	9
Federal Deposit Insurance Corp. v. Glickman 450 F.2d 416 (9th Cir. 1971)	9
Federal Trade Comm'n v. American Tobacco Co. 274 U.S. 543, 47 S.Ct. 663, 71 L.Ed. 1193 (1927).	11
General Talking Pictures Corp. v. Western Electric 304 US 175, 82 L.Ed. 1274, 58 S.Ct. 849	6
Ingram v. Madison Square Garden Center, Inc. 709 F.2d 807 (2nd Cir. 1983)	8
Lirette v. Popich Bros. Water Transport, Inc. 660 F.2d 142 (5th Cir. 1981)	10
Mayor of Philadelphia v. Educational Equality League 415 U.S. 605 (1974)	8
Morgan v. Commercial Union Assurance Co. 606 F.2d 554 (5th Cir. 1979)	9

Morita v. Southern California Permanente Medical Group
541 F.2d 217 (9th Cir. 1976), cert. denied 429 U.S. 1050 (1977) 8

NLRB v. Pittsburgh S.S. Co.
340 US 498, 503 95 L.Ed. 479, 482, 483 71 S.Ct. 453, 456 (1951) 6

Scott v. Pacific Maritime Ass'n,
695 F.2d 1199
(9th Cir. 1983) 8

United States v. First Nat. Bank of Circle
652 F.2d 882 (9th Cir. 1981) 9

STATUTES

28 U.S.C. § 2101 i, 4
42 U.S.C. § 1981 1
42 U.S.C. § 1983 1
42 U.S.C. § 1985 1
42 U.S.C. § 1986 1
42 U.S.C. § 2000e, et seq. i, 1, 2, 4, 5

STATEMENT OF THE CASE

This case was tried without a jury in the United States District Court for the District of Arizona on July 17 and 20, 1984. Petitioner, Francisco A.H. Rivera filed a complaint in federal court on July 21, 1981, alleging that the State of Arizona and Arizona Department of Economic Security ("the State") discriminated against him based on his national origin, hispanic. Rivera sought relief under 42 U.S.C. § 2000e et seq., Title VII of the Civil Rights Act of 1964, as amended ("Title VII").

Thereafter, on November 4, 1981, an amended complaint was filed by Rivera seeking relief under additional civil rights statutes, 42 U.S.C. §§ 1981, 1983, 1985 and 1986. In his complaint, Rivera, an employee of the State Department of Economic Security in

Tucson, Arizona, alleged that the State discriminated against him by withholding promotions and advancements and compelling him to resign from his employment.[1/]

On November 25, 1983, the parties, represented by counsel, filed a joint pretrial order pursuant to F.R.C.P. 42(C). In that pretrial order, the only claim for relief was made pursuant to 42 U.S.C. § 2000e, et seq., and the only issue before the Court was whether Rivera's non-selection for a position of Acting Child Protective Services Supervisor constituted unlawful discrimination. An amended joint pretrial order

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[1/]The allegation of forced or "constructive resignation" is moot since the Petitioner, Francisco Rivera, did not resign and has been continuously employed by the Arizona Department of Economic Security from November 19, 1975, to the present.

was filed on July 11, 1984, adding additional witnesses. The issue before the Court, however, remained the same.

A two day evidentiary trial took place. Thereafter, on August 8, 1984, the Court issued Findings of Fact, Conclusions of Law and Order, ruling in favor of the State on the issue presented at trial. Judgment was entered in favor of the State and awarded the State its costs on August 9, 1984.

A Notice of Appeal was filed on August 9, 1984. On August 28, 1984, Rivera filed a Motion for Rehearing. That Motion was denied, following oral argument, on September 24, 1984. On October 2, 1984, Rivera filed an Amended Notice of Appeal.

On August 28, 1985 the United States Court of Appeals, for the Ninth Circuit, rendered its memorandum

decision dismissing petitioner's appeal. A motion for rehearing and/or a rehe .ing en banc was denied on December 4, 1985.

A petition for a Writ of Certiorari was filed on March 2, 1986.

JURISDICTION AND TIMELINESS

Jurisdiction below was based upon Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., which vests exclusive jurisdiction over Title VII litigation in federal courts. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 2101.

STATEMENT OF FACTS

This appeal challenges the decision of the District Court of Arizona and the Court of Appeals for the Ninth Circuit that Rivera failed to establish that he was discriminated against due to his national origin, hispanic, in

violation of 42 U.S.C. § 2000e et seq., Title VII, of the Civil Rights Act of 1964, as amended, when he was not selected for a promotional position by the Arizona State Department of Economic Security.

In all proceedings, except the appeal Rivera was represented by counsel. At trial, Rivera's counsel attempted to elicit testimony concerning alleged retaliatory treatment of Rivera. The Judge sustained the State's objection to testimony concerning retaliation on the grounds that this issue was not pleaded, it was not stated as an issue in the pretrial order, nor was it identified as an issue prior to trial. At no time did Rivera's counsel move to amend the complaint pursuant to Rule 15, Federal Rules of Civil Procedure, to include a claim of retaliation.

At the conclusion of the trial,

after examination and cross-examination of witnesses, the matter was taken under advisement by the Court. Thereafter, judgment for the State was entered on August 8, 1984.

REASONS FOR DENYING THE WRIT

1. Petitioner's Arguments Address Questions of Evidence and Seek Only Evidentiary Review.

Ordinarily the Supreme Court does not grant certiorari to review evidence or inferences drawn from them by the courts below. General Talking Pictures Corp. v. Western Electric, 304 U.S. 175, 82 L.Ed. 1274, 58 S.Ct. 849.

As aptly stated by this Court in NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 503 95 L.Ed. 479, 482, 483 71 S.Ct. 453, 456 (1951):

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fairminded judges could find it

> tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations".

Similarly in the case at bar there are no unique issues compelling this court to assume jurisdiction. This court should adhere to the above rules and not review the evidence, evaluate testimony or substitute its judgment for that of the Ninth Circuit. This is merely a simple case where the courts below weighed the evidence and found against the petitioner. This court should not disturb this finding.

2. Rejection of Petitioner's Small Sample Was in Conformity With Prior Decisions of This Court.

Petitioner's arguments were considered and rejected by the courts below. The statistical evidence offered by Rivera, consisting of a six person sample, was found to be insufficient to establish discriminatory intent.

The Courts have consistently recognized that statistical evidence of discrimination based on but a few numbers is not, standing alone, compelling evidence of wrongdoing. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 620-621, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974); Scott v. Pacific Maritime Ass'n, 695 F.2d 1199, 1207 (9th Cir. 1983); Morita v. Southern California Permanente Medical Group, 541 F.2d 217, 220 (9th Cir. 1976), cert. denied, 429 U.S. 1050, 97 S.Ct. 761, 50 L.Ed.2d 765 (1977); Ingram v. Madison Square Garden Center, Inc., 709 F.2d 807, 810 (2nd Cir. 1983).

The finding of the Ninth Circuit is clearly consistent with these holdings.

3. The Ninth Circuit's Rejection of Petitioner's Retaliation Claim Because it was not Included in the Pre-trial Order was not in Conflict With Other Decisions of the Courts of Appeals.

Petitioner's retaliation claim was similarly rejected by the Ninth Circuit because of his failure to include that issue in the pre-trial order.

This exclusion of contentions or evidence not listed or disclosed in the pretrial order has been repeatedly upheld. United States v. First Nat. Bank of Circle, 652 F.2d 882 (9th Cir. 1981); Colvin v. U.S. for Use and Benefit of Magini, etc., 549 F.2d 1338, 1340 (9th Cir. 1977); Federal Deposit Insurance Corp. v. Glickman, 450 F.2d 416, 419 (9th Cir. 1971); Morgan v. Commercial Union Assurance Co., 606 F.2d

554, 556 (5th Cir. 1979); Lirette v. Popich Bros. Water Transport Inc., 660 F.2d 142, 144-145 (5th Cir. 1981); Allen v. United States Steel Corp., 665 F.2d 689 (5th Cir. 1982).

Accordingly, the Ninth Circuit did not err in rejecting Rivera's retaliation claim, which was not stated in the pretrial order.

4. The Ninth Circuit Did Not Err When it Determined That the Testimony of the State's Witnesses was Credible.

Removing the gloss from petitioner's third argument of "pretext" is the basic argument of credibility.

Rivera argues that the courts below erred in giving credence to the testimony of the State's witnesses, over his own witnesses.

Clearly, judgments of credibility and the resolution of conflicting inferences are peculiarly within the

province of the courts below and will not be disturbed by the Supreme Court, Federal Trade Comm'n v. American Tobacco Co., 274 U.S. 543, 47 S.Ct. 663, 71 L.Ed. 1193 (1927).

In short, Rivera has failed to demonstrate that the evaluation of the evidence by the Ninth Circuit or the assessment of the credibility of his testimony and that of other witnesses was clearly erroneous and this Court should not disturb these findings.

CONCLUSION

The bottom line in Rivera's various arguments is that the findings of the courts below should be disregarded and his version of the facts, be accepted.

Since there are no substantial issues pursuant to Rule 17 of the Supreme Court rules, the Court should deny the Writ. The decision below is

neither in conflict with another Court of Appeal or this Court, nor is there any question of federal law which has not been and should be settled by the Supreme Court, nor did the judicial pro ɔedings below not comply with standard procedures. The decisions below were based on the facts presented and has no effect on other litigants. Petitioner had his day in court and failed to convince the trial court of the merits of his claim. No split in the Courts of Appeals exists as to any of the arguments proffered by petitioner nor do any of the rulings below conflict with any decision of the Supreme Court. None of the findings of fact made by the courts below are clearly erroneous and this Court should not disturb these findings.

For the above reasons, the Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 17th day of April, 1986.

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